COUR DE CASSATION

UNIVERSITÉ TOULOUSE 1 CAPITOLE — EUROPEAN SCHOOL OF LAW TOULOUSE

Role of the judge in the contractual matters

8th lecture in the "The role of the judge revisited" series of lectures organised by the Court of Cassation, the Société de Législation Comparée, the University of Toulouse 1 Capitole and the University of Nîmes.

14 June 2021

There are two different approaches to the role of the judge in contractual matters. Firstly, a broad approach, looking at the role played by judges - and therefore legal proceedings - over the life of a contract: do the parties necessarily need to refer the matter to a judge? When? What powers should judges have in such cases? Secondly, a narrower approach, based on civil procedure, looking at the respective roles of judges and the parties in contractual disputes: should judges be able to rule on restitution of their own motion, following an application to void a contract? Should judges be able to award damages of their own motion, after dismissing an application for specific performance? And so on.

To discuss this vast subject, Mr Vincent Vigneau, judge sitting at the first civil division of the French Court of Cassation, along with Ms Lucie Mayer and Mr Thomas Genicon, professors at the Paris II University, agreed to take part in a panel discussion, alternating between short speeches and opportunities for questioning, based on concrete situations.

They started by discussing the role of judges over the life of a contract and concluded that there were mixed signals: some developments enhanced their role (growth in the number of standards and increase in their powers), while the opposite was true for other developments, that appeared to reduce the number of situations in which judges could become involved over the life of a contract (new unilateral rights).

Mr Genicon explained that the contract law reforms were based on the seemingly conflicting goals of social justice and economic efficiency, leading to a dual trend: on the one hand, judges had been given greater powers to review the content of contractual agreements (abuse of a position of dependency, hardship, review of unfair terms and the right to obtain specific performance etc.) but on the other, their powers to punish breaches had been reduced (unilateral determination of prices, unilateral termination, unilateral reduction of prices etc.). The powers held by judges had mainly been strengthened through the creation of new "instruments", namely an explosive increase in the number of legal standards ("reasonable", "manifestly excessive" etc.), which are yet to have a normative impact and do not involve any identifiable legal rule, precisely to allow them to be adapted for each decision: as the judge sees fit.

Mr Vigneau pointed out that the contract law reforms had also, conversely, led to a certain decline in the role of the judge, in the interests of efficiency, as some of the reforms allowed the parties to take the law into their own hands, particularly for a breach of contract: the right to appoint a replacement, reduce the price and terminate the contract unilaterally are all examples of this. However, the reforms

had not followed this logic to the letter and many concessions had been made: for example, the new unilateral powers are exercised by parties “at their own risk” and if the other party challenges the use of a unilateral power in court, the burden of proof may lie with the party who used it, even though they are the defendant.

The introduction of hardship provisions into French law had caused quite a stir and was a controversial innovation but it once again showed, as with the standards, the level of trust placed in the courts by the legislator: judges now have the power to revise contracts, subject to certain conditions. Mr Vigneau raised the question of the constitutionality of these provisions, given the freedom of contract principle. The role of the judge had evolved: instead of looking at the past, judges must now write the future of the parties. They are required to determine the price, meaning that they have to think like an economist and not only a lawyer, even though they are not economists. Mr Genicon shared this view that the role of the judge had been transformed from a “reactive” role to a “proactive” forward-looking role. He pointed out that the new hardship provisions were one of the attacks made by the reforms on the principle of the intangibility of contracts and that this effect had been duplicated by the use of standards, which are a point of concern for the parties (excessively onerous). However, he considers that those provisions are default provisions that can be overridden and that this reduces their impact on the freedom of contract principle.

They then turned to the role of the judge in contractual disputes. Ms Mayer addressed the following question: in cases where the injured party has the option to punish a breach of contract (Article 1217 of the French Civil Code), can judges replace, of their own motion, the remedy chosen by the injured party by another remedy, if the injured party’s application cannot be upheld? For example, can judges considering a termination case order the specific performance or price reduction measures provided for in Article 1223, of their own motion? The answer is probably not, if the judge does not inform the parties. However, why should judges not be allowed to inform the parties that an alternative remedy may be claimed? Ms Mayer argued that neither the principle of party disposition nor the need to remain impartial actually prevents this. At the very least, such a power could be used in cases where this would allow the injured party to file an alternative claim rather than a new claim, in a new set of proceedings, to increase the efficiency of the legal system, which is very dear to German law.

Lastly, judges could become “supporting judges” in contractual disputes, as suggested by François Ancel, Presiding Judge. Mr Vigneau and Mr Genicon both found it regrettable that no procedural provisions had been introduced as part of the contract law reforms, to enable judges to settle any problems with interpretation, the application of standards or the use of unilateral rights as and when they arise during the performance of a contract. For example, a party applying for a revision of a contract under the hardship provisions will need to obtain a decision quickly (as is in public procurement cases) to settle, in summary proceedings, the disputes arising from an unexpected change in the circumstances of the performance of the contract.